2005

State of Utah v. Douglas Dale Jones : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DOUGLAS DALE JONES, Defendant/Appellant.	Case No. 20050948-CA

BRIEF OF APPELLEE

APPEAL FROM AN ORDER REVOKING DEFENDANT'S PROBATION, FOLLOWING A CONVICTION FOR CRIMINAL NON-SUPPORT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-7-201(3), IN THE FIFTH JUDICIAL DISTRICT COURT OF UTAH, BEAVER COUNTY, THE HONORABLE PAUL D. LYMAN PRESIDING

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ORAL ARGUMENT NOT REQUESTED

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Utah Code Ann. § 77-18-1 (West 2004);

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **DOUGLAS DALE JONES,** **Defendant/Appellant.**	**Case No. 20050948-CA**

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDING

Defendant appeals from the trial court's revocation of his probation following a conviction for criminal non-support, a third degree felony, in violation of Utah Code Ann. § 76-7-201(3) (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUE

Issue: Is defendant entitled to relief when he has not cited to any authority that could grant relief?

Standard of Review: No standard of review applies. Utah's appellate courts are "resolute in [their] refusal to take up constitutional issues which have not been properly preserved, framed and briefed." *Brigham City v. Stuart*, 2005 UT 13, ¶ 14, 122 P.3d 506, *rev'd on other grounds*, 126 S.Ct. 1943 (2006).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statute and rule are attached at Addendum A:

Utah Code Ann. § 77-18-1 (West 2004);
Utah Rules of Criminal Procedure 22.

STATEMENT OF THE CASE

In June, 2004, defendant was charged with criminal nonsupport, a third degree felony. R1. He entered a plea of no contest one month later. R10–38, 40. The trial court sentenced him to an indeterminate term of zero to five years in prison. R49. However, the court suspended that sentence and placed defendant on probation for 36 months. *Id.* The court also ordered defendant to pay $27,534.33 in restitution, to maintain full-time verifiable employment, to receive a mental health evaluation, to keep his probation officer apprised of his place of residence, and to abide by the written agreement that defendant would enter into with Adult Probation and Parole (AP&P). R52–53.

Approximately six months after it granted defendant's probation, the court received an affidavit from defendant's probation office reporting numerous probation violations. R59–60. The court held a hearing for an Order to Show Cause in May, 2005. R68–70. It revoked and restarted defendant's probation. R71–73. In August, defendant's probation officer filed another affidavit alleging further violations. R77–78. After defendant failed to attend his hearing on this second

Order to Show Cause, the court issued a bench warrant. R83-84. One week later, defendant requested a hearing for a Voluntary Appearance on his Bench Warrant. R87-88. The court notified defendant of the hearing scheduled for September 19, 2005. R89-90. However, defendant failed to appear at the hearing. R92. Nevertheless, the trial court revoked defendant's probation, and committed defendant to prison for an indeterminate term of zero to five years. R91, 94.

Defendant timely appealed. R104.

STATEMENT OF FACTS

"[S]he did not have enough money to pay for their school clothes."

For four years, defendant knowingly failed to honor his divorce decree and his parental obligations. Under the terms of his divorce decree, he was to support his four children by sending his ex-wife, Debra Jewkes, $250 per child per month, totaling $1,000 per month. R5, 37. Ms. Jewkes estimated that defendant owed approximately $28,500 in past-due support. R5. This total did not include medical bills for the children, for which defendant was partially liable. R5. Ms. Jewkes indicated that defendant had paid support only when it was garnished from his wages. R5. She also reported that "she had her utilities shut off, had to borrow money from her family, and struggled to provide the basic needs of her children and provide them with food." R4. "She stated that she did not have enough money to pay for their school clothes." R4.

The State charged defendant with criminal non-support, alleging that defendant had knowingly failed to pay child support when "any one of [his children] was in needy circumstances." R2. Defendant entered a plea of no contest. R10–38, 40. The court sentenced defendant to an indeterminate term of zero to five years in prison, but suspended the sentence and placed him on probation. R40, 48–49. The probation order had several conditions. Defendant was required to comply with his written agreement with AP&P,[1] maintain a personal residence and apprise his probation officer of his address, receive a mental health evaluation and any treatment recommended by that evaluation, maintain full-time employment, pay $27,534.33 in restitution, and continue the support payments for his three minor children. R52–53.

"I'm tired of playing this game."

In March, 2005, defendant's probation officer, Agent David Lowry, filed an affidavit in support of an Order to Show Cause, alleging that defendant had: (1) "absconded in avoiding contact with AP&P" and not provided his address; (2) failed to enter into a mental health program; (3) failed to pay his supervision fees, as required by his written probation agreement with AP&P; and (4) failed to report to

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[1] The Probation Agreement is not included in the record, but is referred to in subsequent affidavits as requiring defendant to report to his probation officer regularly and pay supervision fees. *See* R59, 77.

AP&P from October, 2004 to March, 2005, all in violation of the agreement. R59. The trial court held a hearing on an Order to Show Cause. R62-63, 68-70. Defendant appeared, denied the allegations, and requested appointed counsel.[2] After the court found that defendant was not indigent and denied appointed counsel, it offered to continue the hearing. R69. Defendant declined and proceeded pro se. *Id.*

After hearing testimony from both Agent Lowry and defendant, the court found that defendant had violated his probation. R69. It revoked his probation, but restarted it under the same terms, adding the requirement that defendant personally report to AP&P on specific dates: June 1, July 1, August 1, September 1, and October 3. R69, 71-73. The court later recalled that it had tried to accommodate defendant's schedule: "We even went to the point of finding out what day of the week each first of the month was for six months so that we could see if there was a conflict." T. at 14.[3] The court scheduled a review of defendant's probation for October 31. The court made a note to itself to "[p]ut him in jail or prison on his next violation i.e. Oct

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[2] A transcript of this hearing is not included in the record. Thus, the facts of this hearing are gleaned from the minute entry. *See* R68-70.

[3] The transcript of the September 19 hearing is not assigned a record number. Consequently, the State will refer to it as T.

31st - And then terminate his probation." *See* Post-it note on Judge's Notes 5/9/05[4]; *see also* Judge's Notes 5/9/05 at 3 ("Appearance on Oct 31st Send him to prison -").

Three months later, Agent Lowry filed another affidavit in support of an Order to Show Cause, in which he alleged that defendant had failed to provide proof of mental health treatment, failed to pay his supervision fees, and failed to report to AP&P in June, July and August. R77. Defendant was personally served with notice of the hearing, which was scheduled for August 29. R81. However, the morning of the hearing, defendant called Agent Lowry and told him that he would not be attending.[5] R84. When asked why he could not come, defendant "responded that Mr. Lowry should make up a reason." R83. He later told Agent Lowry that he could not find a ride and was "tired of playing this game." R83. The trial court continued the hearing and issued a bench warrant for defendant's arrest. R83.

About a week later, defendant filed a Request for Hearing for Voluntary Appearance on a Bench Warrant, in which he requested a hearing "as soon as possible." R88. On September 14, the court served defense counsel with notice of the hearing.

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[4] The trial court's notes, while included in the record, are not numbered.

[5] The transcript for this telephonic hearing is not in the record. Details of the hearing are drawn from the minute entry. *See* R83-84.

"Where is Mr. Jones?"

The court convened for defendant's hearing at 10:00 a.m. on Monday, September 19. R91-92. The court began by asking defense counsel, "Where is Mr. Jones?" T.4. Defense counsel reported that she had spoken with defendant on Friday, and he had indicated "he would be here." T. 4. The court asked Agent Lowry if he had heard from defendant, to which Agent Lowry responded, "I have not." T. 4. The court noted, "Well, he didn't make it to his last hearing either. That's why I issued the warrant for his arrest." T. 4. The court asked the prosecutor if he was ready to proceed, and indicated that it would find that defendant had voluntarily absented himself. T. 4. The prosecutor noted that defendant had requested this hearing, and that the State was ready to proceed. T. 5. He recommended a prison sentence, which he indicated would be "the same regardless of whether [defendant was] [t]here or not." T. 5.

The court addressed defense counsel, noting that defendant was "choosing not to be here. This is his second hearing he's chosen not to make it for." T. 5. Defense counsel stated that "we would prefer not to proceed now," but if the court chose to proceed, she would respond. T. 5.

The prosecutor called Agent Lowry, who testified that he had not received evidence from defendant proving that defendant had obtained his mental health evaluation by June 1. T. 6. Although defendant had received a "modified"

evaluation, it was not the one AP&P required. T. 6. Defendant had since been informed that he needed a more complete evaluation, but he had not obtained one. T. 6-7. Defendant had failed to report in person to AP&P on June 1, July 1, or August 1. T. 7. Although defendant had called and left a message on Agent Lowry's answering machine, defendant did not report to AP&P on June 1. T. 7. Agent Lowry contacted defendant through his work and asked him to report the next day, but defendant "just never showed up." T. 7. Agent Lowry finally made contact with defendant by telephone on June 17, and told him that he would need to report in on the following Monday, "and I would wait for him if he had to be late." T. 7. Nevertheless, defendant failed to report that day. T. 7.

In July, Agent Lowry tried to have defendant's case transferred to American Fork, which was closer to the motel at which defendant stayed. T. 7. However, the transfer was cancelled when defendant failed to report to the American Fork office. T. 7-8. Defendant did not report to AP&P in July or August. T. 8. He also failed to pay his supervisory fees. T. 8-9.

On cross-examination, defense counsel elicited that defendant had taken an anger management class, but that it was not the complete evaluation that AP&P had required. T. 9. Agent Lowry admitted that defendant had left messages on his machine, calling early in the morning or late at night, but would not make any more effort to contact Agent Lowry. T. 9-10. Agent Lowry informed the court that July 1

was normally his day off, but he "came in and worked that day just in case [defendant] came in." T. 10. However, defendant did not arrive. T. 10. Agent Lowry confirmed that he had spoken with Ms. Jewkes, defendant's ex-wife, and that she appreciated the support payments that had been arriving. T. 11. Apparently, "the garnishment ha[d] been going as planned over the past several months." T. 11.

The prosecutor recommended prison time because defendant was "playing a game with us on these little minor things that he doesn't want to comply with." T. 12. Defense counsel admitted that defendant's was a "difficult situation" and that there was "very little excuse for [defendant] not complying to the letter as this court directed him." T. 12. However, she asked the court to consider that defendant would not be making money while incarcerated, leaving his children without the support they had been receiving. T. 12. She indicated that defendant "is wary of authority and may question the directives that he's given," and asked the court to give him "additional time to bring himself into compliance" with the court's order. T. 13.

The court explained that defendant "likes to play the victim." T. 14. It indicated that at the May, 2005 hearing it had "made it absolutely crystal clear that [defendant] was to show up in person on the first of every month." T. 14. The court noted that in order to get a transfer to a closer AP&P office, "[a]ll [defendant] had to do was show up." T. 14. It explained that for his previous probation violations it

"gave him no punishment at the last hearing. I told him it was his last chance. He gets no additional chances." T. 15. The court treated his early morning phone messages as "an attempt to try to get out of appearing," and recognized that Agent Lowry had been willing to accommodate defendant's schedule. T. 15. The court found that defendant had not made "any effort to comply at all" with paying his supervision fees. T. 16.

The court considered his failure to appear as an indication that the court needed to "get his attention to let him know we are actually serious about this [] thing." T. 16. It continued, "when someone simply fails to appear, and this is the second time he's failed to appear, I have no choice in my mind but to let him know that we are serious about this." T. 16. The court revoked defendant's probation and ordered his commitment to the Utah State Prison. T. 16–17.

SUMMARY OF ARGUMENT

Defendant's reliance on Utah Rule of Criminal Procedure 22 and *State v. Wanosik* is misplaced, as they govern sentencing hearings following a criminal conviction. "Probation revocation proceedings are civil in nature," *State v. Hudecek*, 965 P.2d 1069, 1071 (Utah App 1998), and are governed by Utah Code Ann. § 77-18-1(12). Therefore, the heightened due process requirements of Rule 22 and *Wanosik* are not applicable. Defendant is entitled only to limited due process rights.

However, defendant has not alleged any violation of Utah Code Ann. § 77-18-1(12) or due process. Therefore, this Court should not address the issue.

Even if *Wanosik* applied to probation revocation proceedings, the trial court made a "reasonable inquiry" into defendant's location, and determined from the totality of the circumstances that defendant's absence was voluntary. Defendant, who had notice of the hearing, repeatedly failed to report to his probation officer, had voluntarily missed his previous probation revocation hearing, and had expressed his disinterest in the probation process generally. Thus, the trial court did not err by questioning defense counsel and defendant's probation officer about defendant's absence, and then finding that defendant had voluntarily absented himself.

ARGUMENT

WANOSIK DOES NOT GOVERN PROBATION REVOCATION PROCEEDINGS AND DEFENDANT HAS NOT ALLEGED ANY OTHER GROUNDS FOR RELIEF

Defendant claims that the trial court violated Utah Rule of Criminal Procedure 22 and the requirements of *State v. Wanosik*, 2003 UT 43, 79 P.3d 937, by revoking his probation *in absentia*. Aplt. Br. at 5–9. Because "there could have been a legitimate and justifiable excuse or reason explaining [defendant's] non-appearance," he argues, the trial court was obligated to conduct an inquiry into his absence before proceeding with the hearing. Aplt. Br. at 6. Defendant's argument is

misplaced because Rule 22 and *Wanosik* do not apply to probation revocation proceedings.

A. Trial courts are required to make a reasonable inquiry regarding a defendant's absence from a sentencing hearing.

In a sentencing hearing, a trial court may not automatically presume a voluntary waiver unless it makes a "reasonable inquiry" as to why defendant is not present. *Wanosik*, 2003 UT 46, ¶ 24. This duty is imposed upon the sentencing court because "defendants have the right to be present at all stages of the criminal proceedings against them and [] it is the burden of the prosecution to show that an absent defendant has knowingly and voluntarily waived that right before sentencing in absentia can proceed." *Id.* at ¶ 12 (citations omitted). Moreover, Rule 22, which governs sentencing hearings, imposes an "affirmative duty to provide both an opportunity to address the court and present information relevant to sentencing before imposing sentence." *Id.* at ¶ 25.

However, defendant was present at his sentencing hearing. *See* R49. At issue here is his probation revocation hearing. Defendant has cited no authority, and the State can find none, that extends the requirements of Rule 22 or *Wanosik* to revocation hearings. To the contrary, probation revocation hearings are governed by different standards and procedures.

B. Probationers have fewer due process rights at a revocation hearing than they have at sentencing.

Utah courts, when dealing "with the question of revocation of probation," have long indicated that "when a person has been found guilty of an offense and sentenced, he is in quite a different status than he is before conviction." *Velasquez v. Pratt*, 443 P.2d 1020, 1021 (Utah 1968). A probation revocation hearing is "not a criminal prosecution," *State v. Bonza*, 150 P.2d 970, 972 (Utah 1944), but is "civil in nature." *State v. Hudecek*, 965 P.2d 1069, 1071 (Utah App. 1998). "Such proceedings are 'entirely independent of any related criminal proceeding.'" *Id.* (quoting *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1154 (Utah 1995)).

When a convicted defendant enters into a probation agreement, he enters into "essentially a contract with the court: the court agrees to stay part or all of the statutory sentence, and the probationer in turn agrees to perform or abstain from performing certain acts." *State v. Hodges*, 798 P.2d 270, 278 (Utah App. 1990). Like a parole revocation proceeding, "[d]ifferent burdens of proof and different procedural rules apply." *Petersen*, 907 P.2d at 1154.

Probation revocation hearings are not governed by Rule 22. Rather, their procedure is laid out by Utah Code Ann. § 77-18-1(12) (addendum A). Defendant does not acknowledge this distinction. *See* Br. Aplt. at 5. Consequently, he requests relief under case law and court rules governing sentencing hearings. *See* Br. Aplt. at

5-10. However, revocation hearings, which are civil in nature, do not have the same procedural protections as sentencing, which is a critical phase of a criminal prosecution. *See State v. Gomez*, 887 P.2d 853, 854-55 (Utah 1994) ("Sentencing is a part of a criminal proceeding. Thus, a defendant is entitled to due process protections during sentencing to prevent procedural unfairness.") (citation omitted). The due process afforded a defendant during critical phases of a criminal prosecution is substantially greater than that provided during a civil revocation proceeding.

Probationers are entitled to due process. However, the process they are entitled to is limited. The United States Supreme Court established the minimum requirements of parole revocation hearings in *Morrissey v. Brewer*, 408 U.S. 471 (1972). These requirements were extended to probation revocations in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (holding that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*").

The Court began its analysis "with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey*, 408 U.S. at 480 (citation omitted). The Court then turned "to the question whether the requirements of due process in general apply to parole revocations." *Id.* The

Court determined that the limited liberty provided by parole was "valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482. But it also noted that "[o]nce it is determined that due process applies, the question remains what process is due." *Id.* At 481. The Supreme Court determined that the termination of parole "calls for some orderly process, however informal." *Id.* at 482. It then listed the minimum requirements of due process in revocation hearings:

> They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking the parole.

Id. at 489. These limited due process rights have been codified in Utah Code Ann. § 76-18-1(12) (West 2004). *See State v. Green*, 757 P.2d 462, 464 (Utah 1988) ("[T]he power to revoke probation must be exercised within legislatively established limits."); *State v. Grate*, 947 P.2d 1161, 1167 (Utah App. 1997) ("[A] court's jurisdiction over probation revocation proceedings is governed by statute."). A trial court's failure to provide these procedures is grounds for reversal. *See State v. Gastelum-Lopez*, 2001 UT App 348, ¶ 1 (unpublished) ("The failure to follow the procedures outlined in section 77-18-1(12)(b) - (c) warrants reversal.") (attached at Addendum B).

C. This Court should not address an issue that defendant has not raised in his opening brief.

Defendant has not argued that the trial court denied him any of the due process rights he was entitled to at a probation revocation hearing. He has also not asked this Court to consider whether *Wanosik*'s "reasonable inquiry" requirement should be extended to probation revocation hearings. He has not cited *Morrissey* or *Gagnon* or claimed that the proceeding *in absentia* violated due process. In short, he has alleged no basis for this Court to grant him relief. As such, this Court should not consider the issue. Utah appellate courts are "resolute in [their] refusal to take up constitutional issues which have not been properly preserved, framed and briefed." *Brigham City v. Stuart*, 2005 UT 13, ¶ 14, 122 P.3d 506, *rev'd on other grounds by* 126 S. Ct. 1943 (2006). *See also State v. Weaver*, 2005 UT 49, ¶ 19, 122 P.3d 566 (refusing to address plain error argument raised in reply brief because a defendant must "articulate the justification for review in [his] opening brief."); *State v. Reyes*, 2002 UT 13, ¶ 5, 40 P.3d 630 (holding that "by failing to address on appeal" an issue the Court could consider, the defendant had "waived consideration of that issue").

D. In any case, the trial court made a reasonable inquiry and determined, from the totality of the circumstances, that defendant voluntarily absented himself.

Even if *Wanosik* applied to this case, the trial court did not simply presume that defendant was voluntarily absent, as defendant contends. Br. Aplt. at 9-10.

"[T]he question of voluntariness is highly fact-dependent" and "is tied to the totality of the circumstances in particular cases." *Wanosik*, 2003 UT 46, ¶ 15. Moreover, "[t]rial courts are well-positioned to assess what questions need to be asked and answered before voluntariness can be properly inferred." *Id.* at ¶ 15. Defendant has not suggested to this Court what would have constituted a "reasonable inquiry" into defendant's whereabouts, but broadly asserts that the court conducted none. *See* Br. Aplt. at 9–10. However, the record reveals that the trial court made a brief, but reasonable inquiry into the reason for defendant's absence, and inferred from the totality of the circumstances that he voluntarily absented himself.

The court was aware that defendant had voluntarily absented himself from his August 29 hearing because he was "tired of playing this game." R83. On September 19, defendant did not arrive at the hearing that he had specifically requested. *See* R87–88. The trial court inquired whether defense counsel or defendant's probation officer had been in contact with defendant. T. 4. They answered that they did not know defendant's location. T. 4. The trial court, which is "well-positioned" to determine how deep an inquiry is required, made a brief but reasonable inquiry and concluded that it had sufficient information to properly infer that defendant's absence was voluntary.

Considering the totality of defendant's behavior over the previous year, and the responses from defense counsel and defendant's probation officer, the trial court

could reasonably infer that defendant had voluntarily absented himself. Defendant had failed to report in person to AP&P from October, 2004 through March, 2005, when the court admonished him to abide by the probation agreement. R59, R68-70. Even after the trial court specifically ordered defendant to report to AP&P on specific days in June, July, August, September and October, defendant failed to report. R69, 71-73. Defendant's voluntary absence at the August 29 hearing, combined with his consistent failure to report in person to AP&P for more than nine months of probation, suggests that defendant was not taking his situation seriously. *See* T. 16. Although he had told defense counsel that he would attend, he failed to appear, and failed to notify his defense counsel as to why he could or would not appear. The trial court reasonably determined that defendant's absence was a result of his own choice. Viewing his absence from the totality of the circumstances, the trial court correctly found that defendant had voluntarily absented himself from his revocation hearing.

CONCLUSION

The State respectfully requests this Court to affirm the trial court's order revoking defendant's probation.

Respectfully submitted August 1st, 2006.

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CERTIFICATE OF SERVICE

I certify that on August 2, 2006, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Douglas Dale Jones, by mailing them, postage prepaid, to his counsel of record as follows:

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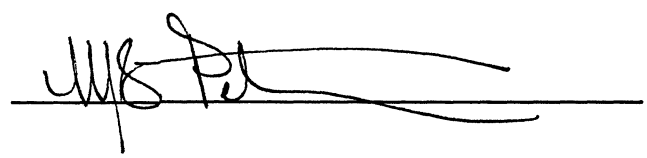

Addenda

Addendum A

U.C.A. 1953 § **77-18-1**

WEST'S UTAH CODE ANNOTATED
TITLE 77. UTAH CODE OF CRIMINAL PROCEDURE
CHAPTER 18. THE JUDGMENT

§ 77-18-1. Suspension of sentence--Pleas held in abeyance--Probation--Supervision--Presentence investigation--Standards--Confidentiality--Terms and conditions--Termination, revocation, modification, or extension--Hearings--Electronic monitoring

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2)(a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b)(i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(3)(a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5)(a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family.

(c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act.

(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6)(a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the

U.C.A. 1953 § **77-18-1**

court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs;

(v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

(ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

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(A) a diagnosed learning disability; or

(B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

(b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10)(a)(i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

(ii)(A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.

(b)(i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11)(a)(i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

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(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12)(a)(i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e)(i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

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(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) The court may order the defendant to commit himself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63- 2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative; or

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(15)(a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76- 3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

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(16)(a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

(i) the defendant to wear an electronic monitoring device at all times; and

(ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

Laws 1980, c. 15, § 2; Laws 1981, c. 59, § 2; Laws 1982, c. 9, § 1; Laws 1983, c. 47, § 1; Laws 1983, c. 68, § 1; Laws 1983, c. 85, § 2; Laws 1984, c. 20, § 1; Laws 1985, c. 212, § 17; Laws 1985, c. 229, § 1; Laws 1987, c. 114, § 1; Laws 1989, c. 226, § 1; Laws 1990, c. 134, § 2; Laws 1991, c. 66, § 5; Laws 1991, c. 206, § 6; Laws 1992, c. 14, § 3; Laws 1993, c. 82, § 7; Laws 1993, c. 220, § 3; Laws 1994, c. 13, § 24; Laws 1994, c. 198, § 1; Laws 1994, c. 230, § 1; Laws 1995, c. 20, § 146, eff. May 1, 1995; Laws 1995, c. 117, § 2, eff. May 1, 1995; Laws 1995, c. 184, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 3, eff. May 1, 1995; Laws 1995, c. 337, § 11, eff. May 1, 1995; Laws 1995, c. 352, § 6, eff. May 1, 1995; Laws 1996, c. 79, § 103, eff. April 29, 1996; Laws 1997, c. 390, § 2, eff. May 5, 1997; Laws 1998, c. 94, § 10, eff. May 4, 1998; Laws 1999, c. 279, § 8, eff. May 3, 1999; Laws 1999, c. 287, § 7, eff. May 3, 1999; Laws 2001, c. 137, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 7, eff. May 6, 2002; Laws 2002, 5th Sp. Sess., c. 8, § 137, eff. Sept. 8, 2002; Laws 2003, c. 290, § 3, eff. May 5, 2003.

Utah Rules of Criminal Procedure **Rule 22**

C

West's Utah Court Rules Annotated Currentness
State Court Rules
Utah Rules of Criminal Procedure

→**RULE 22**. SENTENCE, JUDGMENT AND COMMITMENT

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

[Amended effective January 1, 1995; January 1, 1996.]

CROSS REFERENCES

Pleas in abeyance agreement, see §§ 77-2a-2 and 77-2a-3.

Postconviction Remedies Act, application, see § 78-35a-102.

LAW REVIEW AND JOURNAL COMMENTARIES

Addendum B

Not Reported in P.3d, 2001 WL 1476573 (Utah App.), 2001 UT App 348
(Cite as: Not Reported in P.3d)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Liberado GASTELUM-LOPEZ, Defendant and Appellant.

No. 20000829-CA.

Nov. 16, 2001.

Linda M. Jones and James A. Valdez, Salt Lake City, for appellant.
Mark L. Shurtleff and Jeffrey S. Buckner, Salt Lake City, for appellee.

Before GREENWOOD, DAVIS, and THORNE, JJ.

MEMORANDUM DECISION (Not For Official Publication)

DAVIS, Judge.

***1** Gastelum-Lopez argues that the court violated his rights under the probation revocation statute, Utah Code Ann. § 77-18-1(12) (Supp .1997), [FN1] and his right to due process.[FN2] The failure to follow the procedures outlined in section 77-18-1(12)(b)-(c) warrants reversal.

FN1. We utilize the 1997 version of the statute because it was the law when Gastelum-Lopez was sentenced. *See Smith v. Cook,* 803 P .2d 788, 792-93 (Utah 1990).

FN2. Due to our disposition on Gastelum-Lopez's procedural statutory claim, we do not reach his constitutional arguments or his separate claim that he had a statutory right to appointed counsel.

Although bench probation is specifically authorized by section 77-18-1(2)(a)(ii), there is no provision excepting bench probation from compliance with the requirements of section 77-18-1(12)(b). Section 77-18-1(12)(b)(i) provides that to commence a revocation proceeding, there must be an affidavit filed alleging particular facts that, if proven, would constitute a violation. According to the statute, the court must then make a preliminary probable cause determination, and if the court finds there is probable cause to believe there has been a violation, it "shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked." *Id.* § 77-18-1(12)(b)(ii); *see also State v. Grate,* 947 P.2d 1161, 1165 (Utah Ct.App.1997) (stating the proper way to initiate a probation revocation proceeding is to issue an order to show cause). Under section 77-18-1(12)(c), the show cause order "shall" specify the time and the place for the hearing, "shall" give the probationer at least five days advance notice of the hearing, "shall" inform the probationer of a right to counsel and to appointed counsel if indigent, and "shall" inform the probationer of the right to present evidence. These procedures were not followed, and on this record we cannot say Gastelum-Lopez waived these rights. *Cf. State v. Martin,* 1999 UT App 62, ¶¶ 14-16, 976 P.2d 1224 (upholding trial court's determination that probationer had waived rights provided by section 77-18-1(12)(b) (e)). Therefore, it was reversible error for the court to disregard the mandatory language of the statute. *See State v. Labrum,* 925 P.2d 937, 940 (Utah 1996) (failing to follow statute requiring mandatory written findings for sentence enhancement was plain error requiring reversal); *Martin,* 1999 UT App 62 at ¶ 9 (implying that if probationer does not waive the procedural protections of section 77-18-1(12)(b)-(e) , the procedures "must be followed").

Based on the court's failure to comply with the mandatory language of section 77-18-1(12)(b)-(c), our confidence in the outcome is sufficiently

undermined that we must reverse the order revoking Gastelum-Lopez's probation.

However, we reject Gastelum-Lopez's contention that he is now entitled to outright release because the three year probation period has expired. This case does not present the potential for placing a probationer in a perpetual state of limbo, expecting that his probation has terminated only to be subject to a later revocation, as was the situation in *Smith v. Cook*, 803 P.2d 788 (Utah 1990). Here, Gastelum-Lopez had no reasonable expectation that his probation had terminated because a revocation hearing was held before the probation period terminated, he admitted a violation, and he was remanded to custody to serve the balance of his sentence. Thus, we agree with the State that the revocation proceeding, although defective, did toll the probationary period, *see State v. Call*, 1999 UT 41, ¶ 11, 980 P.2d 201, and we remand for further proceedings consistent with section 77-18-1(12)(b)-(c).

***2** Reversed and remanded.

PAMELA T. GREENWOOD, Presiding J. and WILLIAM A. THORNE, JR., J., concur.
Utah App.,2001.
State v. Gastelum-Lopez
Not Reported in P.3d, 2001 WL 1476573 (Utah App.), 2001 UT App 348

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